

Family First Coronavirus Response Act (FFCRA)

Human Resources Guide to the FFCRA Leave Requests

Please Note, this form is a **TEMPLATE** and should be customized to meet your dealership's individual needs and practices. Additionally, this form does not constitute legal advice or counsel and is being provided for educational purposes only. Finally, because of the changing nature of this law and the Department of Labor interpretations, we strongly encourage dealers to consult with your labor and employment counsel.

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Human Resources Guide to the Family First Coronavirus Response Act (“FFCRA”) Leave Requests

On April 01, 2020 employees of dealerships with between 1 and 499 employees are eligible to request paid leave under the FFCRA. These leave provisions were created by a time-limited statutory authority established under the FFCRA and are set to expire on December 31, 2020.

The FFCRA provides for two different types of paid leave, Emergency Paid Sick Leave Act (“EPSLA”) leave and Emergency Family Medical Leave Expansion Act (“EFMLEA”) leave. Each type of leave has differing requirements and things you need to consider. This guide is an attempt to assist HR Personnel with understanding the steps involved with the leave. Please note this guide does not constitute legal advice or counsel and you are strongly encouraged to consult with your counsel. Also, this information is based on current information which may change as further government guidance is issued.

Step 1: Complete a Leave Application for FFCRA

Because documentation will be crucial to recouping these costs from the IRS, we strongly encourage dealerships to document the leave request through a written request by the employee. The Dealership will be required to provide substantiation and supporting material in order to receive the reimbursement. OADA has prepared a template for your use however you should customize it to ensure it meets your needs. Please reach out to OADA for more information.

In addition to a written leave request, other documentation should be maintained to support a reimbursement request including:

- Records to support amount of leave paid such as time records;
- How the amount of qualified health plan expenses allocated to wages was determined;
- Copies of completed Forms 7200 Advance of Employer Credits Due to COVID-19 submitted to the IRS; and
- Copies of completed Forms 941, Employer’s Quarterly Federal Tax Return submitted to the IRS.

Step 2: Is the Applicant an Employee of the Dealership?

While this may seem like a basic question, the first step is to confirm that the applicant for leave is an employee of the dealership at the time of application. Given the significant decrease in sales and service, the dealership may have taken actions to furlough, layoff, or terminate employees and those employees may believe they are entitled to the benefits of this law. It is important to determine whether an employee who has been “laid off” is still considered an employee of the dealership and has an expectation to return to work. An example is an employer who was laid employees off due to a government order because the employer is not an “essential business” or the employee does not work for an “essential function” of the business.

According to the Department of Labor (“DOL”), if the dealership has closed its worksite and stops paying employees because it does not have work for them to do, the employee would not be eligible for any of the leave outlined by the FFCRA whether it closed the dealership before or after April 01, 2020. This is

true whether the dealership closes for lack of business or because it is required to close pursuant to a Federal, State, or local directive. If the dealership closes after the FFCRA's effective date (even if the employee requested leave prior to the closure), the employee will not get paid sick leave or expanded family and medical leave. (See Questions 23 and 24 [HERE](#) for more detailed guidance).

Additionally, if the dealership furloughs employees on or after April 01, 2020, but remains open, any furloughed employees would be ineligible for the paid leave benefits of the FFCRA. (See Question 26 [HERE](#) for more detailed guidance). This law is not retroactive. Therefore, if an employee was laid off or furloughed before April 01, 2020, they would also be ineligible for the paid leave benefits. Only employees who are currently eligible and receiving pay from the dealership would be eligible for paid leave. An employee who is called back to work, may be eligible for the paid leave benefits. Note that an employee who is called back and subsequently requests EFMLEA leave may get credit for previous service in determining the 30 days of employment requirement.

Step 3: Is the Employee Able to Telework?

If an employee is able to telework, they would not be eligible for the paid leave unless one of the qualifying reasons prevents them from being able to perform that work either at the dealership or teleworking. Under the DOL guidance an employee is able to telework when “your employer permits or allows you to perform work while you are at home or at a location other than your normal workplace. Telework is work for which normal wages must be paid and is not compensated under the paid leave provisions of the FFCRA.” (See Question 17 [HERE](#) for more guidance)

If the applicant is a current employee and is unable to telework, then they would be eligible employees for paid federal leave, however they would still need to qualify. Depending on the type of leave requested there are different requirements, please see each section below.

Emergency Sick Leave

Step 4: Determining the Grounds for Leave.

If an eligible employee applies for the paid emergency sick leave, they must provide a qualifying reason. ***Leave should not be permitted without them providing grounds and support.*** According to the statute, there are only 6 reasons. Those are:

- (1) The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19;
- (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- (4) The employee is caring for an individual who is subject to an order or self-quarantined as described above under (1) and (2);
- (5) The employee is caring for a son or daughter if school or child care is closed/unavailable; or
- (6) The employee is experiencing “any other substantially similar condition” specified by HHS.

It is recommended that you have your employees designate one of these 6 reasons and provide additional information as required. Additionally, employees will need to provide additional support for their request. This could include:

- *A copy of the order that places them in quarantine or isolation;*
- *A letter or statement from the healthcare provider instructing them to self-quarantine (for themselves or the individual they are caring for);*
- *Confirmation of appointment for medical treatment or to obtain a medical diagnosis;*
- *A statement or notice from the school or child care provider stating that the school is closed or unable to care for child because of COVID-19 related issues.*

Finally, at this point the Department of Health and Human Services (“HHS”) has not released any additional guidance that we are aware of.

Step 5: Determining Leave Amount Pay

If an employee takes paid sick leave under reasons (1) – (3), then the employee will be entitled to either the employee’s regular rate of pay or any applicable federal, state, or local minimum wage, whichever is greater.

If an employee requests leave for reasons (4) – (6), then the employee will be entitled either to two-thirds of his/her regular rate of pay or two-thirds of any applicable federal, state, or local minimum wage, whichever is greater.

Finally, any amount of paid to an employee is capped to a maximum amount under the FFCRA. Those maximums are outlined in section (b) of this step.

For the purposes of our analysis, we presume that all employee’s regular rate of pay will meet or exceed any minimum wage obligations.

(a) What is the employee’s regular rate of pay?

For purposes of the FFCRA, an employer must determine the employee’s regular rate of pay over a 6-month period prior to the date on which the employee begins his/her leave. An employee’s regular rate of pay is determined by the total pay for employment (except for the statutory exclusions) in any workweek divided by the total number of hours actually in that workweek. For more information on how to calculate an employee’s regular rate of pay, see the DOL’s factsheet [HERE](#).

If an employee has not worked for the dealership for six months, the regular rate used to calculate the employee’s paid leave is the average of his/her regular rate of pay for each week he/she has worked for your current employer.

All compensation, including commissions, tips, or piece rates, will be incorporated into the above calculation.

You can also compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period.

(b) FFCRA Statutory Maximum

	Reasons (1) – (3)	Reasons (4) – (6)
Maximum Daily Pay	\$511.00/Day	\$200/day
Maximum Aggregate Pay	\$5,110 Total	\$2,000 total

Step 6: Determine the Amount of Time for Leave Requested

While a full-time applicant may take a maximum of 10 days/two weeks (80 hours), a part-time applicant would be entitled to only two weeks of paid time based on the average number of hours that the employee works over a typical two-week period. For example, if a part-time employee only works 15 hours per week for the dealership, then he/she would only be entitled to 15-hours per week on leave, for a total of 30 hours of paid sick leave.

Additionally, an employee may be able to take intermittent leave if they are teleworking. In that situation, the employee and employer may agree that the employee may take paid sick leave intermittently while teleworking. Similarly, an employer and employee may agree to an intermittent leave schedule leave required because the employee needs to care for their child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons. Intermittent leave for the purpose of provide child care may be apply to employees who are reporting to work as well as employees who are teleworking.

If teleworking is unavailable, then sick leave cannot be taken intermittently if the leave is being taken because:

- You are subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- You have been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- You are experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- You are caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- You are experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Remember, unless you are teleworking, paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments.

Step 7: Notify Payroll of Modification

Based on the information above, you will need to notify your payroll processor to change the compensation based on the information determined above.

EFMLEA Leave

Step 4: Determining the Grounds for Leave.

If an eligible employee applies for paid EFMLEA leave, they must have worked for the dealership for at least 30 calendar days and be unable to work (or telework) due to the need for leave to care for a **son or daughter** under 18 years of age because the child's school or place of care has been closed or the son or daughter's caregiver is unavailable due to an emergency with respect to COVID-19 declared by a federal, state, or local emergency. A "son or daughter" is defined by the FMLA regulations as a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis who is either under 18 years of age, or is age 18 or older who is incapable of self-care because of a mental or physical disability.

According to the DOL, an employee is considered to have been employed for at least 30 **calendar days** if the employee was on the employer's payroll for the 30 calendar days immediately prior to the day the employee's leave would begin. For example, if an employee wanted to take leave beginning on April 6, 2020, the employee would need to have been on the employer's payroll as of March 6, 2020. In the DOL's temporary rule, the department states that the EFMLEA applies to employees who were laid off or otherwise terminated on or after March 1, 2020, had worked for the employer for at least thirty of the prior 60 calendar days, and were subsequently rehired or otherwise reemployed by the same employer.

Additionally, employees will need to provide additional support for their request. This could include:

- *The name and address of the school and/or childcare facility;*
- *A statement or notice from the school or child care provider stating that the school is closed or unable to care for child because of COVID-19 related issues;*
- *Confirmation that no other person will providing care for the child during the period for which I would be receiving family medical leave.; and*
- *If your child is over the age of 14 needs care during daylight hours then a statement on the special conditions needed.*

Step 5: Determining Leave Amount Pay

A qualifying employee is entitled to either a two-thirds of his/her regular rate of pay or the FFCRA threshold, **whichever is less**.

(a) What is the employee's regular rate of pay?

For purposes of the FFCRA, an employer must determine the employee's regular rate of pay over a 6-month period prior to the date on which the employee begins his/her leave. An employee's regular rate of pay is determined by the total pay for employment (except for the statutory exclusions) in any workweek divided by the total number of hours actually in that workweek. For more information on how to calculate an employee's regular rate of pay, see the DOL's factsheet [HERE](#).

If an employee has not worked for the dealership for six months, the regular rate used to calculate the employee's paid leave is the average of his/her regular rate of pay for each week he/she has worked for your current employer.

All compensation, including commissions, tips, or piece rates, will be incorporated into the above calculation.

You can also compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period.

(b) Statutory Maximum

EFMLA Leave	
Maximum Daily Pay	\$200/day
Maximum Aggregate Pay	\$10,000 total

Step 6: Determine the Amount of Time for Leave Requested

If an employee qualifies for leave, then they are entitled to 12 weeks of job protected leave. However, only 10 weeks are paid. The first two weeks of EFMLA leave are unpaid. *However, an employee may elect, but cannot be required, to supplement the unpaid leave with either emergency paid sick leave or any accrued PTO, vacation, or sick leave. You should ask the employee if they wish to supplement the unpaid portion of the leave.*

A part-time applicant would be entitled to only 12 weeks of leave, 10 of which are paid time, but only the number of hours equal to the average number of hours that the employee works over a typical two-week period. So, for example, if a part-time employee only works 15 hours per week for the dealership, then he/she would only be entitled to 15-hours per week of paid leave.

Remember, an employee may take intermittent leave in any increment for EFMLA leave, provided that the employee and the dealership agree. For example, if the dealership and the employee agree, the employee may take expanded family and medical leave on Mondays, Wednesdays, and Fridays, but work Tuesdays and Thursdays, while the employee's child is at home because the child's school or place

of care is closed, or child care provider is unavailable, due to COVID-19 related reasons, for the duration of your leave.

Step 7: Notify Payroll of Modification

Based on the information above, you will need to notify your payroll processor to change the compensation based on the information determined above.

Reimbursement for Leave Paid

Step 8: Determining Leave Paid out to Employees under FFCRA

The dealership should closely track the amount of leave paid to employee through the FFCRA because they are entitled to a dollar-for-dollar reimbursement of those expenses through their IRS payroll tax submissions. The dealership should also collect the supporting material (request for leave and supplemental information) prior to approval of the leave to be prepared to present if necessary.

Step 9: Deducting Leave Costs from Outstanding Payroll Tax Obligations

Employers who pay qualifying sick or child care leave are entitled to an immediate dollar-for-dollar tax offset by retaining an amount of the payroll taxes equal to the amount of qualifying sick and child care leave that they paid, rather than deposit them with the IRS.

For example, if an eligible employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to \$5,000 of the \$8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$3,000 on its next regular deposit date.

Step 10: Requesting Reimbursement if Leave Costs Exceed Payroll Tax Obligations

If there are not sufficient payroll taxes to cover the cost of qualified sick and child care leave paid, employers will be able file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less. The details of this new, expedited procedure will be announced next week.

For example, if an eligible employer paid \$10,000 in sick leave and was required to deposit \$8,000 in taxes, the employer could use the entire \$8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining \$2,000.

Additional Resources

All dealership personnel should be aware that this is a continuously evolving situation and should continue to look for updates. Please consult with these additional resources for additional and expanded guidance.

- Department of Labor – Families First Coronavirus Response Act: Questions and Answers - [HERE](#)
- Internal Revenue Service – Guidance on paid leave and tax credits - [HERE](#)
- Fisher Phillips LLP – Comprehensive and Updated FAQs For Employers on The COVID-19 Coronavirus - [HERE](#)
- Fisher Phillips LLP – Dealership FAQs on COVID-19 for Automobile Dealerships – [HERE](#)

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